

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
SEPTIC SAFETY, INC.)	File No. EB-04-TC-064
)	NAL/Acct. No. 200532170005
Apparent Liability for Forfeiture)	FRN 0012636247

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: February 2, 2005

Released: February 3, 2005

By the Chief, Telecommunications Consumers Division, Enforcement Bureau:

I. INTRODUCTION

1. In this *Notice of Apparent Liability for Forfeiture* ("NAL"),¹ we find that Septic Safety, Inc. ("Septic Safety")² apparently willfully or repeatedly violated section 227 of the Communications Act of 1934, as amended ("Act"), and the Commission's rules and orders by delivering at least two unsolicited, prerecorded advertising messages to two consumers.³ Based on the facts and circumstances surrounding these apparent violations, we find that Septic Safety is apparently liable for a forfeiture in the amount of \$14,500.

II. BACKGROUND

2. On April 30, 2004, in response to consumer complaints alleging that Septic Safety had delivered unsolicited, prerecorded advertising messages to several consumers, the Commission staff

¹47 U.S.C. § 503(b)(1). The Commission has the authority under this section of the Act to assess a forfeiture against any person who has "willfully or repeatedly failed to comply with any of the provisions of this Act or of any rule, regulation, or order issued by the Commission under this Act" See also 47 U.S.C. § 503(b)(5) (stating that the Commission has the authority under this section of the Act to assess a forfeiture penalty against any person who is not a common carrier so long as (A) such person is first issued a citation of the violation charged; (B) is given a reasonable opportunity for a personal interview with an official of the Commission, at the field office of the Commission nearest to the person's place of resident; and (C) subsequently engages in conduct of the type described in the citation).

²Septic Safety also does business as "Environmental Safety International, Inc.," "Environmental Products International," "DJC Holding Company," "SAACA Industries, Inc.," "EPI, Inc.," and "ESI Products." Accordingly, this Order applies to these companies as well. Our research revealed that all of the companies' offices are in New Jersey, and that for all of the companies, Joseph Carney is listed as the President and Sean Carney is listed as the Vice President.

³See 47 U.S.C. § 227(b)(1)(B); 47 C.F.R. §§ 64.1200(a)(2); see also *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278, Report and Order, 18 FCC Rcd 14014 (2003) (*TCPA Revisions Report and Order*).

issued a citation to Septic Safety⁴ pursuant to section 503(b)(5) of the Act. The staff cited Septic Safety for delivering one or more prerecorded, unsolicited advertisements to a residential telephone line, in violation of section 227 of the Act and the Commission's rules and orders.⁵ According to the consumers, the unsolicited advertisements offered information concerning septic tank treatments.⁶ The citation, which the staff served by certified mail, return receipt requested, informed Septic Safety that subsequent violations could result in the imposition of monetary forfeitures of up to \$11,000 per violation and included a copy of the consumer letters that formed the basis of the citation. The citation informed Septic Safety that within 30 days of the date of the citation, it could either request a personal interview at the nearest Commission field office, or could provide a written statement responding to the citation. The Commission received a signed return receipt evidencing Septic Safety's receipt of the citation on May 5, 2004. Septic Safety did not respond to the citation.

3. Despite the citation's warning that subsequent violations could result in the imposition of monetary forfeitures, the Commission has received additional consumer complaints indicating that Septic Safety apparently continued to send illegal prerecorded, unsolicited advertisements after receiving the citation.⁷ As discussed below, we base our action here on this information from consumers alleging that Septic Safety sent unsolicited prerecorded advertising messages after the date of the citation, and that the messages did not qualify for any exemption from the prohibition provided by our rules. Although we are acting on relatively few complaints against Septic Safety here, we take action now to protect consumers because Septic Safety has continued to violate the law since our April 2004 citation.

III. DISCUSSION

A. Violations of the Commission's Rules Restricting Prerecorded Messages

4. Section 227(b)(B) of the Act prohibits any person from initiating "any telephone call to any residential telephone line using any artificial or prerecorded voice to deliver message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission."⁸ Section 64.1200(a)(2) of the Commission's rules provides exemptions for calls: 1) made for emergency purposes; 2) made for non-commercial purposes; 3) made for commercial purposes that do "not include or introduce an unsolicited advertisement"⁹ or

⁴See Citation from Kurt A. Schroeder, Deputy Chief, Telecommunications Consumers Division, Enforcement Bureau, issued to Septic Safety on April 30, 2004.

⁵See 47 U.S.C. § 503(b)(5) (requiring the Commission to issue citations to non-common carriers for violations of the Act or of the Commission's rules and orders).

⁶See, e.g., Letter from Gerald Baldwin requesting Commission action, which was attached to the citation, along with four other such complaints.

⁷See the following consumer complaints requesting Commission action: 1) Complaint of Jim Keehner, filed July 26, 2004 (received prerecorded message on July 17, 2004); 2) Complaint of Richard Cusick, filed August 30, 2004 (received prerecorded message on August 30, 2004). Both of the complainants signed declarations stating that the messages they received advertised Septic Safety's septic tank treatments, and that they did not have established business relationships with Septic Safety.

⁸ 47 U.S.C. § 227(b)(1)(B).

⁹ "Unsolicited advertisement" means "any material advertising the commercial availability or quality of any property,

constitute a telephone solicitation”;¹⁰ 4) to persons “with whom the caller has an established business relationship”¹¹ at the time the call is made”; and 5) “made by or on behalf of a tax-exempt nonprofit organization.”¹²

5. As noted above, Septic Safety initiated prerecorded messages that invited customers to try its septic tank treatments. Based on the record before us, we find that the prerecorded messages at issue here were not made for any emergency or non-commercial purposes, and were not on behalf of a tax-exempt, nonprofit organization, but were commercial in nature and included or introduced “unsolicited advertisements” or constituted “telephone solicitations.” We have previously found that “prerecorded messages containing free offers and information about goods and services that are commercially available are prohibited to residential telephone subscribers, if not otherwise exempt.”¹³ The Commission’s rationale was based on a finding by Congress that consumers considered the prerecorded telephone calls to be “a nuisance and an invasion of privacy.”¹⁴

6. The record also indicates that Septic Safety did not have the prior express consent of the consumers here to deliver this unsolicited advertising message or telephone solicitation. In fact, Septic Safety continued to deliver messages to complainant Jim Keehner after his repeated requests to refrain.¹⁵ Further, Septic Safety has provided neither argument nor evidence in response to our citation to prove tax-exempt nonprofit status or an established business relationship with any of the consumers that it was calling. Nor has Septic Safety provided any other information that might provide a defense to the allegations at issue here. Therefore, based on the evidence in the record, including the consumers’ affidavits, we find that the prerecorded messages were unsolicited advertisements or telephone solicitations that were prohibited by section 227(b)(1)(B) of the Act¹⁶ and Section 64.1200(a)(2)¹⁷ of the

goods, or services which is transmitted to any person without that person’s prior express invitation or permission.” 47 C.F.R. § 64.1200(f)(10).

¹⁰ “Telephone solicitation” means “the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.” 47 C.F.R. § 64.1200(f)(9).

¹¹ An “established business relationship” is defined as “a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscribers purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber’s inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.” 47 C.F.R. § 64.1200(f)(3).

¹² 47 C.F.R. § 64.1200(a)(2).

¹³ *TCPA Revisions Report and Order*, 18 FCC Rcd at 14097-98 (2003).

¹⁴ *Id.* at 14,097. The Commission also noted that Congress had determined that the prerecorded messages “cause greater harm to consumers’ privacy than telephone solicitations by live telemarketers” because consumers feel powerless to stop the messages, which are often delivered to answering machines and often provide no means to request placement on a do-not-call list. *Id.*

¹⁵ See Complaint of Jim Keehner (stating that when Mr. Keehner received a call from Septic Safety on July 17, 2004, it was the “third time [he had] been contacted by [Septic Safety] in Greenville, North Carolina in the last year”).

¹⁶ 47 U.S.C. § 227(b)(1)(B).

Commission's rules.

B. Proposed Forfeiture

7. We conclude that Septic Safety apparently willfully or repeatedly violated the Act and the Commission's rules and orders by delivering unsolicited, prerecorded advertising messages. Septic Safety apparently did not cease its unlawful conduct even after the Commission staff issued a citation warning that it was engaging in unlawful conduct and could be subject to monetary forfeitures. Accordingly, a proposed forfeiture is warranted against Septic Safety for its apparent willful or repeated violations of section 227 of the Act and of the Commission's rules and orders regarding restrictions on telephone solicitations.

8. Section 503(b) of the Act authorizes the Commission to assess a forfeiture of up to \$11,000 for each violation of the Act or of any rule, regulation, or order issued by the Commission under the Act by a non-common carrier or other entity not specifically designated in section 503 of the Act.¹⁸ In exercising such authority, we are to take into account "the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require."¹⁹

9. Although the Commission's Forfeiture Policy Statement does not establish a base forfeiture amount for violating the prohibition on delivering unsolicited, prerecorded advertising messages to a residential telephone line, we recently found these violations to be similar in nature to violating the prohibition on delivering unsolicited advertisements to telephone facsimile machines. In *Warrior Custom Golf*,²⁰ the Enforcement Bureau ("Bureau") considered \$4,500 per pre-recorded advertising message to be an appropriate base amount, and we apply that amount to the apparent unsolicited, prerecorded advertising violation evidenced by Richard Cusick's complaint.²¹ We find that

¹⁷ 47 C.F.R. § 64.1200(a)(2).

¹⁸ Section 503(b)(2)(C) provides for forfeitures up to \$10,000 for each violation in cases not covered by subparagraph (A) or (B), which address forfeitures for violations by licensees and common carriers, among others. See 47 U.S.C. § 503(b). In accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, Pub. L. 104-134, Sec. 31001, 110 Stat. 1321, the Commission implemented an increase of the maximum statutory forfeiture under section 503(b)(2)(C) to \$11,000. See 47 C.F.R. § 1.80(b)(3). The Commission recently amended its rules to increase the maximum penalties to account for inflation since the last adjustment of the penalty rates. The new amounts apply to violations that occurred after September 7, 2004. *Amendment of Section 1.80(b) of the Commission's Rules and Adjustment of Forfeiture Maxima to Reflect Inflation*, Order, 19 FCC Rcd 10,945 (2004) (\$11,000 statutory maximum remained unchanged).

¹⁹ 47 U.S.C. § 503(b)(2)(D); The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines, Report and Order, 12 FCC Rcd 17087, 17100-17101, (1997), recon. denied, 15 FCC Rcd 303 (1999); Get-Aways, Inc., Forfeiture Order, 15 FCC Rcd 4843 (2000).

²⁰ See *Warrior Custom Golf, Inc.*, Notice of Apparent Liability for Forfeiture, DA 04-3834 at ¶ 10 (Enf. Bur., rel. Dec. 8, 2004) ("*Warrior Custom Golf*") (first NAL to address pre-recorded advertising messages).

²¹ See *Warrior Custom Golf* at ¶ 10 n.27 (citing *Get-Aways, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 4843 (2000); *Tri-Star Marketing, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 11,295 (2000); *Tri-Star Marketing, Inc.*, Forfeiture Order, 15 FCC Rcd 23,198 (2000); *Carolina Liquidators, Inc.*, Notice of Apparent Liability for Forfeiture, 15 FCC Rcd 16,837 (2000); *Carolina Liquidators, Inc.*, Forfeiture Order, 15 FCC Rcd 21,775

the other apparent violation, presented by Jim Keehner's complaint, justifies a higher proposed forfeiture because Septic Safety continued to deliver messages to this consumer even after his repeated requests to refrain. Where a party has delivered pre-recorded advertising messages after a request to stop, the Bureau has increased the proposed forfeiture to \$10,000 per violation.²² Accordingly, we find Septic Safety apparently liable in the amount of \$10,000 for the violation where Septic Safety ignored the Mr. Keehner's specific requests to discontinue the calls. This results in a proposed total forfeiture of \$14,500. Septic Safety shall have the opportunity to submit evidence and arguments in response to this Notice of Apparent Liability for Forfeiture to show that no forfeiture should be imposed or that some lesser amount should be assessed.²³

IV. CONCLUSION AND ORDERING CLAUSES

10. We have determined that Septic Safety apparently violated section 227 of the Act and the Commission's related rules and orders by delivering the unsolicited, prerecorded advertising messages identified above. We have further determined that Septic Safety is apparently liable for a forfeiture in the amount of \$14,500.

11. ACCORDINGLY, IT IS ORDERED, pursuant to section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b)(5),²⁴ and section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, and under the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. § 0.111, 0.311, that Septic Safety, Inc. IS hereby NOTIFIED of an Apparent Liability for Forfeiture in the amount of \$14,500 for willful or repeated violations of section 227(b)(1)(B) of the Act, 47 U.S.C. § 227(b)(1)(B), section 64.1200(a)(2) of the Commission's rules, 47 C.F.R. § 64.1200(a)(2), and the related orders described above.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices ("GAAP"); or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Requests for payment under an installment plan should be sent to: Chief, Revenue and Receivable Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.²⁵

14. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, that within thirty (30) days of the release date of this Notice of Apparent Liability for

(2000); 21st Century Fax Ltd., *Notice of Apparent Liability for Forfeiture*, 15 FCC Rcd 24,406 (2000); 21st Century Fax Ltd., *Forfeiture Order*, 17 FCC Rcd 1384 (2002)).

²² See *Warrior Custom Golf* at ¶ 10.

²³ See 47 U.S.C. § 503(b)(4)(C); 47 C.F.R. § 1.80(f)(3).

²⁴ 47 U.S.C. § 503(b)(5).

²⁵ 47 C.F.R. § 1.1914.

Forfeiture, Septic Safety, Inc. SHALL PAY the full amount of the proposed forfeiture²⁶ or SHALL FILE a response showing why the proposed forfeiture should not be imposed or should be reduced.

15. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Forfeiture shall be sent by first class mail and certified mail return receipt requested to Mr. Joseph Carney and Mr. Sean Carney, Septic Safety, Inc., at the following seven addresses: 316 Prospect Avenue, Hackensack, New Jersey 07601-2625; 205 Anderson Avenue, Fairview, New Jersey 07022; 344 Broad Avenue, Palisades Park, New Jersey 07650; 43 Industrial Avenue, Fairview, New Jersey 07022; P.O. Box 397, Fairview, New Jersey 07022; 44 Washington Avenue, Suite 109, Toms River, New Jersey 08754; and P.O. Box 625, Palisades Park, New Jersey 07650.

FEDERAL COMMUNICATIONS COMMISSION

Colleen K. Heitkamp
Chief, Telecommunications Consumers Division
Enforcement Bureau

²⁶The forfeiture amount should be paid by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on Septic Safety's check or money order to "NAL/Acct. No. 200532170005." Such remittance must be mailed to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482.